

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

DANNY HENSLEY,

Plaintiff,

v.

CIVIL ACTION NO. 2:16-05388
(Criminal No. 2:06-cr-00150)

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

On July 19, 2018, the court received the Proposed Findings and Recommendation (PF&R) of United States Magistrate Judge Dwane L. Tinsley wherein it is recommended that Hensley's Motion to Vacate, Set Aside or Correct Sentence be granted and that his sentence be vacated for the reasons set forth therein. The magistrate judge further recommends that the district court "may then discharge Defendant, resentence him, or correct his sentence as may appear appropriate."

If the court adopts Magistrate Judge Tinsley's Proposed Findings and Recommendation, Hensley is subject to immediate release.* For this reason, the deadline for the filing of objections set forth in the PF&R (17 days) was vacated and the parties were instructed to file their objections, and any

* Because the enhanced penalties under the Armed Career Criminal Act do not apply, Hensley was subject to a maximum term of imprisonment of ten years and a term of supervised release of three years. Hensley has already served in excess of ten years.

response to the PF&R, on or before July 27, 2018. The parties were further directed to set forth their recommended disposition of this matter in their filings. The failure of any party to file such objections constitutes a waiver of such party's right to a de novo review by this court. Snyder v. Ridenour, 889 F.2d 1363 (4th Cir. 1989).

Both July 27, 2018, and August 6, 2018 have passed and no objections or responses were filed by either party. For this reason, the court hereby adopts the findings and recommendation as set forth in the PF&R to the extent set forth below as follows:

- (1) Hensley's Motion to Vacate, Set Aside, or Correct Sentence is **GRANTED** as set forth herein;
- (2) Hensley is sentenced to a term of imprisonment of **TEN (10) YEARS**, with credit for time served;
- (3) A term of supervised release of **THREE (3) YEARS** is imposed, subject to the same terms and conditions as originally imposed;
- (4) In all other respects, the Judgment Order entered in this action on August 15, 2007 (ECF No. 71), shall remain in full force and effect;
- (5) Hensley is, accordingly, subject to release from imprisonment immediately; and

(6) The Bureau of Prisons is directed to process his release as quickly as possible.

Additionally, the court has considered whether to grant a certificate of appealability. See 28 U.S.C. § 2253(c). A certificate will not be granted unless there is "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The standard is satisfied only upon a showing that reasonable jurists would find that any assessment of the constitutional claims by this court is debatable or wrong and that any dispositive procedural ruling is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). The court concludes that the governing standard is not satisfied in this instance. Accordingly, the court **DENIES** a certificate of appealability.

The Clerk is directed to send copies of this Order to Mr. Hensley, counsel of record, and the United States Probation Office.

IT IS SO ORDERED this 7th day of August, 2018.

ENTER:

A handwritten signature in dark ink, appearing to read "David A. Faber", is written over a horizontal line.

David A. Faber

Senior United States District Judge